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Measure of Damages--Action Against a Telegraph Company for its Negligent Failure to Deliver a Telegraph Message Resulting in Loss of Employment

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MEASURE OF DAMAGES—ACTION AGAINST A TELEGRAPH COMPANY FOR ITS NEGLIGENT FAILURE TO DELIVER A TELEGRAPH MESSAGE RESULTING IN LOSS OF EMPLOYMENT

A recent decision in the Kentucky Court of Appeals raised an interesting question of damages.[1] The plaintiff had been employed as a salesman over a period of four years at a fixed salary under a contract terminable at will of either party. While the plaintiff was on a permissive leave of absence he was sent a telegram by his employer relative to his employment. Because of the defendant's negligence in failing to deliver said telegram to the plaintiff, the latter was discharged from his employment. The trial court gave a judgment for substantial damages to the plaintiff, but on appeal the plaintiff's damages were limited to nominal only, on the ground that the measure of the plaintiff's damages was indefinite and uncertain.

This decision represents the prevailing view in most jurisdictions in the United States where the same question, involving a similar state of facts, has arisen. Many of the decisions that support the proposition as set out in the *Ramsay* v. *Western Union Tel. Co.* case[2] are recent ones,[3] most of them having been passed upon since 1900. Even though the bulk of authority is in support of the decision in the case at bar, there still can be made some differentiation, on the basis of the facts, to justify a recovery of substantial damages in that case.

The question of whether or not damages have been proved with any degree of certainty as required by law is one of considerable difficulty and the cases wherein similar questions have been decided are not easily reconciled. In the case of *Story Parchment Paper Co.* v. *Patterson Parchment Paper Co.*,[4] the United States Supreme Court said, "It is true that there was an uncertainty as to the extent of the damages, but there was none as to the fact of damage, and there is a clear distinction between the measure of proof necessary to establish that one has sustained damage and the measure of proof necessary to enable the jury to fix the amount. The rule which precluded the recovery of uncertain damages applies to such as are not the

[1] Western Union Tel. Co. v. Ramsay, 261 Ky. 657, 88 S. W. (2nd) 675 (1933).

[2] *Supra* note 1.

[3] Kerr S. S. Co. v. The Radio Corp. of America, 245 N. Y. 284, 157 N. E. 140 (1927); Postal Tel. Co. v. Bacher, 90 S. W. (2nd) 620 (Tex.) (1936); Western Union Tel. Co. v. Thompson, 299 S. W. 279 (Tex. Civ. App. 1927); De Vice v. Western Union Tel. Co., 214 N. Y. S. 555, 127 Misc. Rep. 5 (1926); Merrill v. Western Union Tel. Co., 78 Me. 97, 2 Atl. 847 (1886); Fulkerson v. Western Union Tel. Co., 110 Ark. 184, 161 S. W. 168 (1913); Western Union Tel. Co. v. Caldwell, 133 Ark. 184, 202 S. W. 232 (1918); Kenyon v. Western Union Tel. Co., 100 Cal. 454, 35 Pac. 75 (1893); Larson v. Postal Tel. & Cable Co., 100 Iowa 748, 130 N. W. 813 (1911); Mondon v. Western Union Tel. Co., 96 Ga. 499, 23 S. E. 853 (1895); Baldwin v. Western Union Tel. Co., 93 Ga. 692, 21 S. E. 212 (1894); Walser v. Western Union Tel. Co., 114 N. C. 440, 19 S. E. 306 (1894).

[4] 282 U. S. 555, 51 Sup. Ct. 284, 75 L. Ed. 544 (1931).

certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain as to the amount." The court in the aforementioned case clearly pointed out the distinction between cases in which the evidence as to the fact of the damage is uncertain and those in which the fact of damage is definitely established. In the instant case, the fact of damage is certain, definite, and can be proven, but the amount or the extent seems to be clouded with doubt. This distinction is fundamental and of utmost importance. Where it clearly appears that a person has suffered damage a more liberal rule should be applied permitting the court or the jury to determine the amount of the damage than should be applied in weighing evidence on the question of whether or not the acts complained of resulted in damage to the party upon whom the burden of proof rests.

In the case of *Allison* v. *Chandler*,[5] which sounded in tort, the court expressed the following view, "But shall the injured party in an action in tort which may happen to furnish no element of certainty be allowed to recover no damages, or mere nominal damages because he can not show the exact amount with certainty, though he is ready to show to the satisfaction of a jury that he had suffered great loss. Certainty, it is true, would be obtained, but it would be the certainty of injustice.

"Ordinarily juries are permitted to act upon probable and inferential as well as direct and positive proof. When from the nature of the case the amount of damages cannot be estimated, there should be no objection to placing before the jury all the facts and circumstances of the case having any tendency to show damages, or their probable amount; so as to enable the jury to make an intelligible and probable estimate which the nature of the case will permit." The fact that there is an uncertainty in the manner or means of estimating the damage is due to the defendant's own wrongful act and in order to carry out the effect of sound public policy and to foster justice the defendant should really bear the risk of uncertainty which his tortious act produced. Why should it not be the situation in the case at bar?

In the case of *Fields* v. *Western Union Tel. Co.*,[6] the plaintiff, a salesman, recovered the amount of his commissions he would have earned during the time he was kept from his employment due to the negligence of the telegraph company in that it failed to deliver a message to the plaintiff. The plaintiff recovered the commissions he probably would have made on the basis of what he had earned in the past during the same period of the year. The possibility of earning the commissions is just as indefinite with regard to the future as is the possibility of retaining employment under a contract terminable at will of either party; and in either case the only evidence that can be taken into consideration is that of the established facts of past employment, past earnings over a similar period of time, or for a

[5] 11 Mich. 542 (1863).
[6] 60 Ore. 209, 137 Pac. 200 (1913).

reasonable time. A jury may be able to estimate or determine the reasonable expectancy of a continuation of employment upon the consideration of facts already in existence, as for example in the case herein discussed. The plaintiff's services had a substantial value especially when employment was scarce. A jury can reach with reasonable certainty, an approximate value of existent employment by taking into consideration such factors as: length of past employment in point of time, whether there was a fixed salary, record of the employee, employer's willingness to re-employ, etc.

The Supreme Court of Michigan has forcefully declared that the risk of uncertainty should be thrown on the wrongdoer instead of the injured person.[7] In the case of *McKibben* v. *Western Union Tel. Co.*,[8] the plaintiff was allowed to recover on the basis of the wages he would have earned from the date of expected employment to the institution of the suit. As to the fact of proving the damage this case is no more certain and definite than the principal case, yet recovery was permitted. The plaintiff in the case of McMillan v. Western Union Tel. Co.,[9] was permitted to show but a reasonable probability that his contract to sell brick would have continued but for the negligent act of the defendant telegraph company. Why should not the plaintiff in the case at bar be permitted to show that there was a reasonable probability that he would have retained his employment but for the negligent act of the defendant telegraph company? A recent Montana decision[10] ruled in effect that where a telegram indicates that it relates to an important business transaction and that delay will probably cause loss to the addressee, recovery is not limited to nominal damages. A Tennessee decision[11] permitted the plaintiff in that case to recover substantial damages for prospective professional services as a physician as a result of the negligent failure of the telegraph company to deliver a message which contained information as to the prospective patient.

In conclusion, the plaintiff should be permitted to recover substantial damages where he has definitely proven the injury caused him by the defendant's tort, and the mere fact that he has not proven the extent of such injury in terms of money should not limit him to nominal damages only. Therefore, if the plaintiff is permitted to introduce evidence from which a jury can draw a just and reasonable inference upon the basis of which they can award him substantial damages, though it be an approximation of such plaintiff's damages, justice will have been better served and there will have evolved a more adequate solution to problems of the same nature as the one in the case at bar.

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[7] *Supra* note 5.

[8] 114 Ind. 511, 14 N. E. 894 (1887).

[9] 60 Fla. 131, 53 So. 332 (1910).

[10] Davenport v. Western Union Tel. Co.—Mont.—9 Pac. (2nd) 172 (1932).

[11] Western Union Tel. Co. v. Green, 153 Tenn. 59, 281 S. W. 778 (1926).